

SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Judiciary Committee

BILL: CS/SB 152

SPONSOR: Judiciary Committee and Senator Siplin

SUBJECT: Alimony

DATE: February 25, 2005

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Maclure	JU	Fav/CS
2.				
3.				
4.				
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I. Summary:

This committee substitute authorizes the court to reduce or terminate an award of alimony where the court has made specific written findings, through a preponderance-of-the-evidence showing by the obligor, that a de facto marriage exists between the obligee and a person of the opposite sex. Provisions in this committee substitute identify a variety of criteria to be used in determining whether a de facto marriage exists.

This committee substitute reiterates that marriages in this state require a marriage license to be solemnized, such that a common law marriage is not recognized.

These provisions provide an alternate method to a court to reduce or terminate alimony, without requiring the court to make a threshold determination of a change in financial circumstance, as is currently law.

This bill substantially amends section 61.14, Florida Statutes.

II. Present Situation:

Traditionally, alimony was more often awarded to a woman based on the premise that she was the dependent spouse, having foregone or sacrificed career opportunities to fulfill the dual role of homemaking and child rearing. Today, alimony is considered to be gender-neutral.¹ In cases where alimony is considered, the amount is assessed by balancing the dependent spouse's needs with the supporting spouse's ability to pay, in light of the standard of living enjoyed during the

¹ Alyson F. Finkelstein, *A Tug of War: State Divorce Courts Versus Federal Bankruptcy Courts Regarding Debts Resulting From Divorce*, 18 Bankr. Dev. J. 169, 171 (2001).

marriage.² The court orders alimony as a lump sum, or through periodic payments.³ Courts now favor rehabilitative or transitional alimony over permanent, periodic alimony, as it encourages self-sufficiency.⁴ Although permanent, periodic alimony is usually considered where there is a dependent spouse, it can also be ordered to balance inequities from the division of property.⁵ Lump sum alimony can also be ordered to correct inequities from property division.⁶ Permanent alimony generally ends when either party dies or when the recipient remarries.⁷ Alimony may be revisited when the need or ability to pay changes significantly, and modifications usually apply prospectively.⁸

The History of Divorce and Alimony

The women's voting rights movement of the 19th century paved the way for other freedoms, such as the right to divorce. Still, "divorce remained difficult or impossible to get in many jurisdictions."⁹ Prior to the late 1960's, studies showed that women who divorced typically experienced an instant and severe decline in their quality of living, while men enjoyed a rapid increase.¹⁰ To get divorced at all, at least one of the parties was required to show fault, usually in the form of adultery, mental illness, physical abuse, or substance abuse.¹¹ Starting in the late 1960's, no-fault divorce legislation was introduced and passed in many states, as a replacement to requiring fault as the basis for divorce.¹² The advent of no-fault divorce served as a precursor to alimony reform.¹³

In 1970, the Uniform Marriage and Divorce Act (UMDA) proposed that:

All property acquired by either spouse after the marriage and before a decree of legal separation...regardless of whether title is held individually or by the spouses in some form of co-ownership barring gifts, inheritance, and interest on previously acquired property—be justly distributed in consideration of the circumstances of the marriage.¹⁴

States have either adopted the original version of the UMDA and authorize division of marital property only, or as in Florida, follow the revised version which includes non-marital property when equity requires.¹⁵

² Sheryl L. Scheible, *Bankruptcy and the Modification of Support: Fresh Start, Head Start, Or False Start?*, 69 N.C. L. Rev. 577, 583-584 (1991).

³ *Id.* at 585.

⁴ *Id.* at 589.

⁵ Victoria M. Ho and Jennifer L. Johnson, *Overview Of Florida Alimony*, 9 Fla. B.J. 71 (October 2004).

⁶ *Id.*

⁷ Scheible, *supra* note 2, at 585.

⁸ *Id.* at 586.

⁹ Katharine T. Bartlett, *Feminism and Family Law*, 33 Fam.L.Q. 475, 478 (1999).

¹⁰ *Id.* at 480.

¹¹ Finkelstein, *supra* note 1, at 171.

¹² Bartlett, *supra* note 9, at 478.

¹³ *Id.* at 482.

¹⁴ Laura Weinrib, *Reconstructing Family: Constructive Trust At Relational Dissolution*, 37 Harv. C.R.-C.L.L.Rev. 207, 217-218 (2002).

¹⁵ *Id.* at FN 55.

From 1975 through 1996, states passed legislation to continue to equalize the quality of living between former spouses and included significant steps to more actively enforce child support.¹⁶

Changes in Alimony Awards

Although awards of permanent alimony were fairly common a generation ago, awards of alimony today are generally restricted to rehabilitative, or short-term, maintenance.¹⁷ This type of alimony is intended to encourage the recipient's independence.¹⁸ Among female recipients, alimony is typically distributed to three groups:

- Women with custody of young children;
- Women in need of transitional support; and
- Older displaced homemakers who are not easily self-sufficient.¹⁹

In many jurisdictions, the term alimony has been replaced by “maintenance” or “support.”²⁰ Some states limit the term of maintenance. In Texas, for example, alimony is limited to maintenance payments of generally no longer than three years.²¹ In addition, a presumption is created in Texas law against the award of maintenance unless the spouse has proven certain conditions.²²

A hybrid type of distribution has also emerged in certain jurisdictions, which authorizes reimbursement, or restitutional alimony, to compensate a spouse for contributions to the other's education or career advancement.²³ Bases proposed by the American Law Institute for the award of compensatory payments include:

- The loss in standard of living due to dissolution by the spouse who has less wealth;
- An earning capacity loss incurred during marriage from one spouse's disproportionate share of child care or from care given to a sick, elderly, or disabled third party;
- The loss incurred upon dissolution before a spouse can realize a fair return from investing in the other spouse's earning capacity;
- An unfair disparity between spouses in their capacity to regain their premarital standard of living after dissolution of a short marriage.²⁴

¹⁶ Bartlett, *supra* note 9, at 480-481.

¹⁷ Weinrib, *supra* note 14, at 218.

¹⁸ *Id.*

¹⁹ Finkelstein, *supra* note 1, at 173.

²⁰ *Id.*

²¹ TEX. FAM. CODE ANN, Chapter 8, Section 8.054.

²² TEX. FAM. CODE ANN, Chapter 8, Section 8.053.

²³ Finkelstein, *supra* note 1, at 174.

²⁴ Ho, *supra* note 5, at 71.

Florida Statutes on Dissolution of Marriage and the Award of Alimony

Chapter 61, F.S., addresses the dissolution of marriage. The purposes of this chapter are, in part, to promote the amicable settlement of disputes arising in marriage, and to mitigate potential harm to the spouses and their children as a result of a legal dissolution of marriage.²⁵

Procedure for Obtaining a Dissolution of Marriage

To obtain a dissolution of marriage, one of the parties must reside in the state for six months prior to the filing of the petition.²⁶ The circuit court is the initial court of jurisdiction for receiving petitions for dissolution of marriage.²⁷

To obtain a judgment of dissolution of marriage, one or both of the parties must plead that either the marriage is irretrievably broken or that mental incapacity exists on the part of one of the spouses, which is supported by an adjudication of incapacity for the period of at least the last three years.²⁸

Where there is no minor child of the marriage, and the responding party does not deny that the marriage is irretrievably broken through answer to the petition, the court is required to enter a judgment of dissolution of the marriage if the court finds that the marriage is irretrievably broken. Otherwise, the court is authorized to order either or both parties to consult with a counselor, religious clergy, or others, continue the proceedings for up to three months, or take other actions in the best interest of the parties and minor children of the marriage.²⁹ During periods of continuance, the court is authorized to enter orders for support and alimony.³⁰

Determination of Alimony

In determining the amount, if any, to be awarded for alimony, income to be considered is defined as:

Any form of payment...regardless of source, including, but not limited to: wages, salary, commissions and bonuses, compensation as an independent contractor, worker's compensation, disability benefits, annuity and retirement benefits, pensions, dividends, interest, royalties, trusts, and any other payments, made by any person, private entity, federal or state government, or any unit of local government. United States Department of Veterans Affairs disability benefits and unemployment compensation...are excluded from this definition of income except for purposes of establishing an amount of support.³¹

²⁵ s. 61.001(2), F.S.

²⁶ s. 61.021, F.S.

²⁷ s. 61.043(1), F.S.

²⁸ s. 61.052(1), F.S.

²⁹ s. 61.052(2), F.S.

³⁰ s. 61.052(3), F.S.

³¹ s. 61.046(7), F.S.

Florida law provides for allocation of assets based on equitable distribution, such that the court is required to premise its allocation based on an equal distribution of marital assets and liabilities. The court is required, however, to consider the following as justification for departure from equal distribution:

- The contribution to the marriage by each spouse, including care and education of children and other homemaker services;
- The financial situation of the parties;
- The duration of the marriage;
- Any interruption or contribution of careers or educational opportunities of either party;
- The interest in retaining any asset in a business;
- The contribution of each spouse to the acquisition, enhancement, and production of income or improvement of, or the incurring of liabilities to, both the marital assets and the non-marital assets of the parties;
- The interest in retaining the marital home as a residence for any dependent child of the marriage;
- The intentional destruction or dissipation of marital assets after the filing of the petition or within two years of its filing; and
- Any other factors to do justice and equity between the parties.³²

Where the court awards a cash payment, in full or in installments, the full amount ordered vests when the judgment is awarded, and the award is considered a debt that does not terminate upon remarriage or death of either party, unless otherwise agreed to by the parties.³³

Marital assets and liabilities include:

- Assets acquired and liabilities incurred during marriage, individually by either spouse or jointly by them;
- The enhancement in value and appreciation of non-marital assets resulting during the marriage or from the contribution to or expenditure thereon of marital funds or other forms of marital assets, or both;
- Interspousal gifts during the marriage;
- All vested and non-vested benefits, rights, and funds accrued during the marriage in retirement, pension, profit-sharing, annuity, deferred compensation, and insurance plans and programs; and
- All real property held by the parties as tenants by the entireties, acquired prior to and during the marriage.³⁴

All assets acquired and liabilities incurred by either spouse after the date of marriage and not specifically established as non-marital assets or liabilities are presumed to be marital assets and

³² s. 61.075(1), F.S.

³³ s. 61.075(2), F.S.

³⁴ s. 61.075(5)(a), F.S.

liabilities.³⁵ The court is authorized to provide for equitable distribution without awarding alimony, but is required to consider alimony after its determination of equitable distribution.³⁶

Alimony may be rehabilitative or permanent in nature, through periodic payments or payments in lump sum, or both. The court is authorized to consider the adultery of either party in determining the amount of alimony.³⁷

In determining a proper award of alimony or maintenance, the court is required to consider all relevant economic factors, including:

- Standard of living established during the marriage;
- Duration of the marriage;
- Age and physical and emotional condition of each party;
- Financial resources of each party, the non-marital and marital assets and liabilities distributed to each;
- Time needed for acquiring sufficient education or training;
- Contribution of each party to the marriage, such as homemaking, child care, education, and career building of the other party;
- All sources of income; and
- Any other factor necessary to do equity and justice between the parties.³⁸

Modification of Alimony

When the circumstances or financial ability of either party changes, either party is authorized to petition the court to modify the amount of alimony.³⁹ The court is then granted discretion to enter an order decreasing or increasing the amount of alimony. If alimony is changed, the court may apply the modification retroactively to the date of the filing of the action, based on what is equitable.⁴⁰ The court may enter a modification order regardless of whether the party applying for it has fully paid the accrued obligations to the other party at the time of the application or modification.⁴¹ When a modification order is entered, the new order is transferred to the original court of jurisdiction, and becomes a part of the original action.⁴²

Anti-Cohabitation Statutes in Other States

A handful of states provide for an automatic termination of alimony upon a showing of cohabitation, which are Alabama, Louisiana, Pennsylvania, and Texas.⁴³ More often than not, states that address cohabitation in alimony statutes authorize, rather than require, the court to terminate or modify alimony. These states include California, Connecticut, Georgia, Illinois,

³⁵ s. 61.075(7), F.S.

³⁶ s. 61.075(8), F.S.

³⁷ s. 61.075(1), F.S.

³⁸ s. 61.08(2), F.S.

³⁹ s. 61.14(1)(a), F.S.

⁴⁰ *Id.*

⁴¹ s. 61.14(4), F.S.

⁴² s. 61.17(1), F.S.

⁴³ *Pattberg v. Pattberg*, 130 Misc.2d 893, 895 (N.Y. Sup. 1985).

Louisiana, Oklahoma, New York, Pennsylvania, South Carolina, Tennessee, Utah, and West Virginia.⁴⁴ Of these, some authorize modification but not termination, such as California, Connecticut, Georgia, Oklahoma, and Tennessee.⁴⁵ A showing of cohabitation creates a rebuttable presumption that financial circumstances have changed in states such as California and Tennessee.⁴⁶

Examples of States That Authorize the Court to Modify or Terminate Alimony: Georgia, New York, South Carolina, West Virginia

Georgia law provides that the voluntary cohabitation of a recipient can be a basis for modification of alimony payments.⁴⁷ Although Georgia law does not recognize automatic cessation of alimony in the event of cohabitation, parties are still free to contract for such an immediate result.⁴⁸

New York law authorizes the court to cease payment of alimony upon a showing that a wife is habitually living with another man and holding herself out as his wife, without being married to him.⁴⁹ To prove that an alimony recipient is habitually living with another man, a payor is required to show that:

- The recipient had a relationship with someone of the opposite sex;
- The recipient was living with that person in a capacity other than that of a roommate or housemate; and
- Cohabitation was habitual.⁵⁰

In reviewing an equal protection challenge to the statute, the New York Supreme Court upheld the cohabitation statute, but indicated that the phrase “‘habitually living with another man and holding herself out as his wife’ has previously given rise to some controversy and the question of what conduct on the part of the ex-wife was sufficient to satisfy the statute had long troubled the courts.”⁵¹ However, what the court has termed intermittent intimacy, or occasional contact, does not suffice.⁵²

The South Carolina Legislature recently added continued cohabitation as an additional basis for termination of periodic alimony.⁵³ Continued cohabitation is defined as “the supported spouse [residing] with another person in a romantic relationship for a period of ninety or more consecutive days.”⁵⁴

The West Virginia Code provides:

⁴⁴ *Id.* at 895

⁴⁵ *Id.*

⁴⁶ Carolyn Sievers Reed, *Alimony Modification and Cohabitation in North Carolina*, 63 N.C.L.Rev. 794 (1985).

⁴⁷ GA. CODE ANN. s. 19-6-19(b) (2004).

⁴⁸ *Metzler v. Metzler*, 267 Ga. 892, 893 (Ga. 1997).

⁴⁹ N.Y. DOM. REL. LAW s. 248 (2004). To date, the Legislature has failed to make this provision gender-neutral.

⁵⁰ *Markhoff v. Markhoff*, 225 A.D.2d 1000, 1001 (N.Y.A.D. 1996).

⁵¹ *Pattberg*, *supra* note 43, at 894.

⁵² *See Watson v. Watson*, 39 A.D.2d 660, 661 (N.Y.A.D. 1972).

⁵³ *Joye v. Yon*, 355 S.C. 452, 454 (S.C. 2003).

⁵⁴ S.C.CODE ANN. s. 20-3-130(B)(1) (2002).

In the discretion of the court, an award of spousal support may be reduced or terminated upon specific written findings by the court that since the granting of a divorce and the award of spousal support a de facto marriage has existed between the spousal support payee and another person.⁵⁵

In determining what constitutes a “de facto” marriage, the statute includes such considerations as:

- The extent to which the ex-spouse and the other person hold themselves out as a married couple;
- The period of time that the recipient has resided with another person not related in a permanent residence;
- The extent to which financial assets are pooled;
- The extent to which the recipient and the third party support each other; and
- Whether the recipient and third party have jointly contributed in the purchase of property.⁵⁶

Examples of States That Mandate Termination of Alimony upon Proof of Cohabitation: Alabama, Pennsylvania, Texas

In Alabama, a former spouse’s periodic alimony obligation automatically terminates when the receiving spouse remarries or cohabitates.⁵⁷ In fact, the Alabama Court of Civil Appeals has held that the term “periodic alimony,” by definition, means that payments to a former spouse will terminate upon death, remarriage, or cohabitation.⁵⁸ As such, the Alabama Supreme Court has ruled that a payor’s responsibility automatically ceases from the actual date that the recipient begins cohabitating with a third party.⁵⁹ A payor is not eligible for reimbursement where he or she does pay, however.⁶⁰

Under Pennsylvania law, to constitute cohabitation, the payor must prove two events: some permanency of relationship and more than occasional sexual activity.⁶¹

In Texas, alimony terminates where the recipient cohabits with another person in a “permanent place of abode on a continuing, conjugal basis.”⁶² As noted earlier, a presumption is created

⁵⁵ W.VA.CODE Section 48-5-707(a)(1) (2004).

⁵⁶ W.VA.CODE s. 48-5-707(a)(2) (2004).

⁵⁷ ALA. CODE s. 30-2-55 (2004) reads, in part, “Any decree of divorce providing for periodic payments of alimony shall be modified by the court to provide for the termination of such alimony upon petition of a party to the decree and proof that the spouse receiving such alimony has remarried or that such spouse is living openly or cohabiting with a member of the opposite sex.” See generally *Heaston v. Nabors*, 2004 WL 596089 (Ala.Civ.App.)

⁵⁸ *Wheeler v. Wheeler*, 831 So.2d 629 (Ala.Civ.App. 2002).

⁵⁹ *Ward v. Ward*, 782 So.2d 1285, 1288 (Ala. 2000).

⁶⁰ *Id.* at 1288.

⁶¹ *Tolbert v. Teets*, 27 Pa. D. & C.3d 106, 111 (Pa. Com. Pl. 1983).

⁶² TEX. FAM. CODE ANN. s. 8.056 (2004).

against the award of maintenance unless the spouse has proven certain conditions,⁶³ and alimony is limited to maintenance payments of generally no longer than three years.⁶⁴

Rebuttable Presumption in Modification Cases

California law provides that a presumption is created that financial circumstances have changed where a former spouse is cohabiting.⁶⁵ The courts have interpreted that the Legislature created the presumption “based on thinking that cohabitation...creates a change of circumstances so tied in with the payment of spousal support as to be significant enough by itself to require a re-examination of whether such need for support continues in such a way that it still should be charged to the prior spouse.”⁶⁶

Judicial Consideration of Cohabitation in the Absence of Statutory Authority

Several jurisdictions have considered cohabitation as a factor in terminating alimony, even in the absence of statutory authority, such as Arkansas, Mississippi, and New Jersey.

A finding of cohabitation triggered an Arkansas court to review a change in financial circumstances and end alimony payments based on that finding.⁶⁷

Although Mississippi statutes do not address cohabitation as a basis for termination of alimony, courts have created a test for determining modification of alimony on this basis. This test is whether cohabitation is occurring, whether the recipient is being supported by or is supporting the third party, and whether the recipient’s financial needs have changed.⁶⁸

Similarly, New Jersey statutes do not address termination of alimony where there is cohabitation. However, the Superior Court indicated that cohabitation can generally constitute grounds for alimony modification where there is a concomitant economic benefit.⁶⁹ In fact, where the payor makes a prima facie showing of cohabitation, a rebuttable presumption is created that shifts the burden to the recipient to show that no actual economic benefit is being received.⁷⁰

Cohabitation Clauses in Settlement Agreements

Divorce settlement agreements providing for termination of alimony in the event of subsequent cohabitation have become increasingly common. Courts have reviewed these clauses and routinely upheld them, where there is sufficient evidence of cohabitation.⁷¹

⁶³ TEX. FAM. CODE ANN. s. 8.053 (2004).

⁶⁴ TEX. FAM. CODE ANN. s. 8.054 (2004).

⁶⁵ CAL. FAM. CODE s. 4323

⁶⁶ *In Re Marriage of Bower*, 96 Cal.App.4th 893, 895 (Cal. App.2d 2002).

⁶⁷ *See Herman v. Herman*, 335 Ark. 36, 977 S.W.2d 209 (Ark. 1998).

⁶⁸ *Hammonds v. Hammonds*, 641 So.2d 1211, 1217 (Miss. 1994).

⁶⁹ *Conlon v. Conlon*, 335 N.J.Super. 638, 645 (N.J.Super.Ct. 2000).

⁷⁰ *Rose v. Csapo*, 359 N.J.Super. 53, 61 (N.J.Super.Ct. 2002).

⁷¹ *See generally*, court holdings in North Carolina (*Oakley v. Oakley*, 599 S.E.2d 925 (N.C.App. 2004)); Ohio (*Coe v. Coe*, 2004 WL 1620787 (Ohio App. 2004)); Virginia (*Feinberg v. Hollister*, 2004 WL 835974 (V.A.Cir.Ct. 2004)); and Kentucky (*Bennett v. Bennett*, 133 S.W.3d 487 (K.Y. App. 2004)).

The New Jersey Supreme Court has, however, refused to honor a settlement clause where there was no recognition of an economic needs inquiry.⁷² Here the court based its decision on both its “stated public policy to guarantee individual privacy, autonomy, and the right to develop personal relationships,”⁷³ and long-standing case precedent providing that the test for modification of alimony is whether the relationship has financially changed the needs of the recipient, even where a cohabitation clause exists.⁷⁴ The New Jersey Supreme Court subsequently did authorize a cohabitation clause to stand, where the parties previously agreed that cohabitation would constitute a material changed circumstance, and the contractual provision was fair.⁷⁵

Florida Case Law on Alimony

Critical to the court’s determination of alimony in Florida is the length of marriage. The impact of cohabitation on continuation of alimony payments is not addressed in statute, but a showing of cohabitation triggers a court inquiry regarding whether there has been an attendant change in circumstances. In fact, a presumption of changed circumstances may apply. Courts have terminated alimony payments based on the existence of a cohabitation clause in a dissolution agreement.

Length of Marriage

In a short-term marriage, the standard of living enjoyed by the parties does not merit much consideration.⁷⁶ The approach taken by courts is typically that “a permanent alimony award is generally inappropriate in a short-term marriage unless the dissolution created a genuine inequity.”⁷⁷ In contrast, in a long-term marriage, a rebuttable presumption is created in favor of permanent alimony.⁷⁸ It appears that the line for determining a long-term marriage is generally drawn at a minimum of 14 years.⁷⁹ The Fifth District Court of Appeal considered a marriage of 15 years to be more than a short-term marriage, but not automatically a long-term marriage.⁸⁰ Rather, this length of marriage falls into a “gray area,” consistent with rulings in the First and Second Districts.⁸¹ Marriage lengths which qualify as falling into a “gray area” warrant examination of other relevant factors, without a presumption, prior to an award of permanent alimony.⁸²

⁷² See *Melletz v. Melletz*, 271 N.J. Super. 359 (N.J. Super. A.D. 1994).

⁷³ *Id.* at 364.

⁷⁴ See *Gayet v. Gayet*, 92 N.J. 149 (N.J. 1983).

⁷⁵ See *Konzelman v. Konzelman*, 158 N.J. 185, 197 (N.J. 1999).

⁷⁶ Ho, *supra* note 5, at 71.

⁷⁷ *Segall v. Segall*, 708 So.2d 983 (Fla. 4th DCA 1998).

⁷⁸ Ho, *supra* note 5, at 72.

⁷⁹ *Id.*; see *Knoff v. Knoff*, 751 So.2d 167 (Fla. 2d DCA 2000); *Young v. Young*, 677 So.2d 1301 (Fla. 5th DCA 1996); *Cruz v. Cruz*, 574 So.2d 1117 (Fla. 3d DCA 1990); *Levy v. Levy*, 2003 WL 22240196 (Fla. 3d DCA 2003).

⁸⁰ *Young*, 677 So.2d at 1305.

⁸¹ *Id.*

⁸² *Id.*

Cohabitation

Under Florida law, alimony is not automatically terminated upon a showing of cohabitation.⁸³ Though courts do not recognize de facto remarriage as the sole basis for ending court-ordered alimony,⁸⁴ they have authorized a modification of alimony upon a showing of cohabitation provided that the financial impact of the cohabitation is considered.⁸⁵ Cohabitation does not automatically equal marriage for purposes of alimony modification, as the court in *Springstead* indicated: “Because it does not entail the same benefits, duties and rights as a traditional marriage, cohabitation alone cannot precipitate a termination of alimony without the factual finding of a change in circumstances concerning the former spouse’s needs and finances.”⁸⁶ Still, the First District Court of Appeal indicated that a presumption of changed circumstances arises where cohabitation is proven, thereby shifting the burden to the cohabitant.⁸⁷ In determining the financial impact of cohabitation, the standard is not what the third party should be contributing, but what is actually contributed, such that the additional income is not imputed by the court.⁸⁸ However, the court may modify alimony even based on temporary cohabitation where it is proven that financial contributions were made during the period of cohabitation.⁸⁹

The Fourth District Court of Appeal determined that where a settlement agreement in a marital dissolution case clearly provides for termination of alimony in the event of cohabitation, the agreement must be upheld irrespective of the presence or absence of a change in financial circumstances.⁹⁰ In this case, the agreement provided that alimony would terminate upon the wife’s remarriage, the husband’s death, or the wife’s cohabitation with another man, defined as an unmarried union or relationship of more than 30 days, whether or not it is consecutive in time.⁹¹ As the settlement agreement represents a negotiated document, the court indicated, its provisions are interpreted in accordance with the law on contracts.⁹² As such, alimony must be terminated in the event of cohabitation without consideration of financial impact, where it is so clearly stipulated in a settlement agreement.⁹³

Definitions

Black’s Law Dictionary defines the term “de facto marriage” as follows: “A marriage in which the parties live together as husband and wife under color of validity but which is defective for reasons of form, etc.”⁹⁴

⁸³ See *Tanner v. Tanner*, 850 So.2d 610 (Fla. 1st DCA 2003).

⁸⁴ *Bridges v. Bridges*, 842 So.2d 983, 984 (Fla. 1st DCA 2003).

⁸⁵ *Springstead v. Springstead*, 717 So.2d 203, 204 (Fla. 5th DCA 1998).

⁸⁶ *Id.* at 205.

⁸⁷ *Bridges*, 842 So.2d at 984.

⁸⁸ *Cheney v. Cheney*, 741 So.2d 565, 566 (Fla. 4th DCA 1999).

⁸⁹ *Donoff v. Donoff*, 777 So.2d 1078, 1079 (Fla. 4th DCA 2001).

⁹⁰ *Robinson v. Robinson*, 788 So.2d 1092 (Fla. 4th DCA 2001).

⁹¹ *Id.* at 1093.

⁹² *Id.* at 1094.

⁹³ *Id.*

⁹⁴ Black’s Law Dictionary, 6th ed. (1990).

The term “common law marriage” is defined in Black’s Law Dictionary as one that is not solemnized through a ceremony, but created through an agreement to marry, followed by cohabitation, to include an assumption of marital duties and obligations.⁹⁵

III. Effect of Proposed Changes:

This committee substitute authorizes the court to reduce or terminate an award of alimony where the court has made specific written findings, through a preponderance-of-the-evidence showing by the obligor, that a de facto marriage exists between the obligee and a person of the opposite sex.

In making its determination, the court must consider circumstances such as:

- The extent to which the obligee and the other person hold themselves out as married by using the same last name, a common mailing address, calling each other “husband” and “wife,” or otherwise indicating a stable marriage-like relationship;
- The length of time that the obligee has lived with the other person in a permanent residence;
- The duration and circumstances under which the obligee has maintained a continuing conjugal relationship with the other person;
- The degree to which the obligee and the other person have pooled their resources and income;
- The extent to which the obligee and the other person have supported each other, or performed valuable services for each other or the other’s company or employer;
- Whether the obligee and the other person have created or enhanced anything of value together, or have jointly purchased real or personal property;
- Whether the obligee and the other person have an express or implied agreement regarding property sharing or support.

This committee substitute reiterates that marriages in this state require a marriage license to be recognized, such that a common law marriage is not valid.⁹⁶

These provisions provide an alternate method to a court to reduce or terminate alimony, without first having to find that there has been a change in financial circumstance, as is the case in current law.

The committee substitute provides that it takes effect upon becoming a law.

⁹⁵ *Id.*

⁹⁶ The Legislature banned common law marriage in Florida, effective for all marriages entered into after January 1, 1968 (s. 741.211, F.S.). Before 1968, for common law marriage to be recognized in Florida, the following criteria applied: general repute, cohabitation, capacity, and a present assent to become man and wife. (*See Duey v. Duey*, 343 So.2d 896, 897 (Fla. 3d DCA 1977)).

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Should this bill pass, it will probably only apply prospectively, as retroactive application may be constitutionally suspect under Article I, Section 10 of the Florida Constitution.⁹⁷ Courts in various jurisdictions in Florida have considered settlement agreements to be a form of contractual obligation, thereby subject to contract law.⁹⁸ Where a statute creates a new substantive right or imposes new legal burdens, there is a presumption against retroactivity.⁹⁹ The court will examine whether the right to receive alimony is vested, rather than expectant or contingent. Specifically, the court will inquire whether a present or future enforcement of a demand exists.¹⁰⁰ As several courts in Florida have already recognized dissolution settlement agreements as a type of obligation or contract, there are likely to be constitutional challenges if this bill passes and is applied retroactively.

V. Economic Impact and Fiscal Note:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

There may be an increase in cases filed for modification or termination of alimony.

VI. Technical Deficiencies:

None.

⁹⁷ Art. I, s. 10 provides, in part: “No...law impairing the obligation of contracts shall be passed.”

⁹⁸ See generally, *Johnson v. Johnson*, 848 So.2d 1272 (Fla. 2d DCA 2003); *McIlmoil v. McIlmoil*, 784 So.2d 557 (Fla. 1st DCA 2001); *Kipp v. Kipp*, 844 So.2d 691 (Fla. 4th DCA 2003).

⁹⁹ *R.A.M. of South Florida, Inc. v. WCI Communities, Inc.*, 869 So.2d 1210 (Fla. 2d DCA 2004).

¹⁰⁰ *Id.* at 1219.

VII. Related Issues:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

VIII. Summary of Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.
